

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Citizens Utility Board,)	
Citizen Action/Illinois,)	
and AARP)	
)	
vs.)	
)	No. 08-0175
Illinois Energy Savings Corp.,)	
d/b/a U.S. Energy Savings Corp.)	
)	
Complaint pursuant to)	
220 ILCS 5/19-110 or 19-115)	

STAFF’S RESPONSE TO CUB’S MOTION TO STRIKE

NOW COMES Staff (“Staff”) of the Illinois Commerce Commission (“Commission”), and pursuant to Section 200.190 of the Commission’s Rules of Practice, hereby submits its Response to the Citizens Utility Board’s Motion to Strike (“Motion”) USESC Reply Brief.

Background

In accordance with the schedule set forth in this proceeding, Illinois Energy Savings Corp. d/b/a U.S. Energy Savings Corp. (“USESC” or “Company”) filed its Reply Brief (“Reply Brief”) on December 17, 2009, making reference to CUB Data Request (“DR”) 9.03 and the Company’s response to this DR. CUB DR 9.03 refers to Agent Allegation Reports previously submitted by the Company in response to CUB DRs 2.53 and 6.32 (Reply Brief at 14). In response, Citizen’s Utility Board (“CUB”) and the other complainants (collectively, the “Complainants”) filed the Motion on December 23, 2009. Judge Gilbert established a schedule pursuant to a ruling filed December 23, 2009, with

responses to the Motion due on December 29, 2009 and replies due on January, 4, 2010.

Summary of Position

CUB's Motion correctly seeks to strike portions of the Company's Reply Brief that refer to discovery not in evidence. On pages 14 and 15 of its Reply Brief, the Company discusses CUB DR 9.03 and the Company's response which remain completely outside of the evidentiary record. Furthermore, the Company never referred to this DR and response in testimony nor sought to enter it as part of any witness testimony or cross-examination at hearing. Moreover, the Company had ample opportunity to move this discovery into the record or identify any inaccuracies with respect to the documents referenced in the DR, which were previously produced and verified (as true, correct and complete) by the Company as responsive to CUB's DRs 2.53 and 6.32 (Reply Brief at 14) but chose not to do so.

Instead, the Company submits this discovery in its Reply Brief, as support for an argument never before made and after all opportunity had passed for other parties to test its reliability through cross-examination or testimony, putting Staff and the Complainants at a serious disadvantage. Finally, Staff believes that, as submitted, this discovery does not even support the rationale that the Company purports it does but appears to be a last ditch attempt by the Company to refute arguments regarding the Company's liability. For all of these reasons, Staff believes the DR, its response, and any discussion related to the request and response should accordingly be stricken from the Company's Reply Brief. Attachment A to CUB's Motion adequately identifies the parts of the Company's Reply Brief which should be stricken.

Alternatively, if the ALJ and the Commission decide to permit this discovery to be entered into the record, Staff posits that, in fairness to all parties, Staff and Complainants should be given an equal opportunity to submit additional evidence into the record and, at a minimum, an opportunity to cross-examine the Company on the basis of this discovery. As the record has not yet been marked Heard and Taken, it is still open for additional evidence to be submitted.

Argument

CUB's Motion is correct in that the Company had ample opportunity to rebut the evidence regarding the "Validity" column in Agent Allegation Reports provided and verified by the Company. (CUB Motion, p. 3) The Company should have filed accurate DR responses initially, and certainly could have updated, and indeed had a duty to update, the documents submitted as DR responses when it determined that that the documents were inaccurate or misleading, as the Company now avers in its Reply Brief at 15 ("Thus, in offering the Agent Allegation Reports as evidence of wrongdoing, Complainants are...relying on information they know to be inaccurate..."). The Company could have filed a Motion to Strike that part of CG witness Alexander's surrebuttal testimony that analyzed the validity of the complaints made against the Company based upon the Agent Allegation Reports routinely prepared and submitted by the Company through discovery; instead, the Company chose to move to strike other portions of Ms. Alexander's testimonies on different grounds. The Company could have cross-examined Ms. Alexander during the evidentiary hearing or asked its own witnesses Ms. Findley or Mr. Potter about the "Validity" column to clear up any confusion regarding what "Validity" meant. In addition, when crossed about the validity

of the complaints identified in the Agent Allegation Reports, Company witnesses could have informed the Commission and the parties of the “unreliable” information contained in the reports. At no time, however, did the Company ever suggest or indicate that “Validity” does not mean what it purports to mean until its Reply Brief.

The Company’s Reply Brief indicates that the Complainants did not “understand or deliberately disregarded the meaning of the contents of the Agent Allegation Reports” provided in response to CUB DRs 2.53 and 6.32. (USESC RB, p. 14) The Company presents its response to CUB DR 9.03 as proof of this misunderstanding. (Id.) This response offers no such proof.

First of all, CUB’s question as to “how the Company determines the number assigned to the ‘Validity’ column” does not indicate misunderstanding of the word “Validity.” CUB is specifically requesting how the Company determines its assignment of numbers under this column, presumably the method in which the Company determines blame or accountability. Second, as the response to CUB 9.03 shows, the Company completely avoids answering the DR and refuses to describe its method. (Id., p. 15) The Company could have taken this opportunity to explain what the “Validity” column meant but instead, chose to answer the DR in an unresponsive manner.

Assuming *arguendo* that the Company intended this obtuse response to CUB DR 9.03 to be an update or clarification of the documents submitted as Company’s responses to CUB DRs 2.53 and 6.32 (the DRs which initially revealed the Agent Allegation Reports), then the Company did not provide adequate notice that the responses to the latter DRs were not reliable. The Company’s response to CUB DR 9.03 never states that the data in the “Validity” column field was inaccurate or

misleading. On the contrary, the most anyone can assume from the Company response is that the numbers shown in the “Validity” column actually underreport the number of valid allegations since, per the Company’s response, the validity field “ha[d] not been used after February 2007” and “ha[d] not been eliminated from the data system.” (Id.)

Furthermore, according to the Company, “[t]he purpose of the Agent Allegation Report is to summarize a sales contractor’s current standing in light of his or her allegation history.” (Id., citing Tr. at 206:6-22 (Nicholson)) One has to wonder how this purpose could be fulfilled when the most relevant information to a sales contractor’s current standing with respect to allegations – whether the Company believed the allegations were valid – was, according to the information set forth in the Company’s Reply Brief, inaccurate. In addition, if the response to CUB 9.03 is taken as true (which Staff is not suggesting), it begs the question as to why there are still Agent Allegation Reports being generated after February 2007 with the “Validity” column field in place and numbers assigned under that column for allegations occurring after February 2007.

Additionally, the Company conceded the accuracy of the documents produced in response to CUB 6.32:

Q: And the Company further provided in response to CUB Data Request 6.32 thousands of letters that go to contractors with validly determined allegations informing the contractor of potential consequences. Is that your recollection?

A: Yes, it is.
(Tr. at 486/15 (Potter)) (emphasis added)

...

Q: Do you feel confident that allegation summary sheets accurately present the actual allegations and consequences that occurred?

A: I believe they did if I – and I need to just check. I believe we provided all or only some – I need to review 632 again. I think that's where it came from if that's correct.
(Tr. at 490/12 (Potter))

At no time did Mr. Potter dispute the accuracy of these documents or what these documents purported to be; in fact, his own testimony confirms what Ms. Alexander concluded as to what "Validity" means.

Furthermore, Ms. Findley's own testimony confirms that these documents are what they seem to be:

Q: So the penalty letter indicates that a determination has been made by the Company that the wrongdoing has taken place?

A: Right.

Q: And that the complaint has been deemed conclusive, thereby generating points?

A: Right. One thing to note, though, that even though the penalty letters are generated it doesn't mean that this is the only penalty associated with the complaint.

Q: Okay. But it is – the complaint has been deemed conclusive, though, when there is a penalty letter generated. Agree or disagree?

A: Yes.

(Tr. at 341/13 (Findley))

The Company has admitted that the Agent Allegation Reports and corresponding penalty letters show **valid** or **conclusive complaints** as determined by the Company. For CG witness Alexander to aggregate this information provided by the Company is entirely reasonable. For the Company to now contest what "Validity" means is simply an attempt to backpeddle or confuse the Commission. The Company wants to blame the parties for "blatant mischaracterization" and being "blatantly disingenuous" for accepting the Agent Allegation Reports and penalty letters as showing valid allegations. (USESC RB, p. 15) Yet, the parties have done nothing but use the Company's own admission and evidence of validly determined complaints to show patterns of

misconduct and violations of law, leading to the conclusion that the Company seeks a way to circumvent its own admissions and its own evidence. It should not be permitted to do this.

Finally, assuming *arguendo* that this discovery supports the Company's claim that the Agent Allegation Reports do not accurately reflect the number of validly determined complaints, and leaving aside for a moment the Company's failure to identify its verified summary reports as inaccurate or misleading, nothing in the Company's response to CUB DR 9.03 nullifies the Company's testimony that the Company determined that a number of complaints were valid (See penalty letters identified in Exhibits 5.2 and 5.4 to USESC Ex. 5.0). The Company's response, as supplemented by the explanation set forth in the Reply Brief, merely *suggests* that the penalty letters may more accurately identify the number of those validly determined complaints and that the Agent Allegation Reports are out of date and underreported.

So even assuming the Reply Brief's characterizations of discovery are correct, the discovery does not refute the arguments made by Complainants that violations of the Consumer Fraud Act occurred, as the Reply Brief argues, but only questions the evidence as to the number of violations. In its Reply Brief, the Company argues that penalty letters are the correct indicators of validly determined complaints. (Id., pp. 15-16, 20-21) If the Company is allowed to present evidence and argue that the "Validity" column in Agent Allegation Reports does not mean validly determined complaints and instead, argues that penalty letters are the appropriate method to determine validly determined complaints, then the parties should be able to admit additional evidence of all penalty letters produced by the Company in discovery. Since this record remains

open, if the Commission does not grant the Motion to Strike, Staff suggests that the only fair thing to do is to permit the parties to determine if there is a discrepancy between the number of violations as indicated by the penalty letters and those indicated by the Agent Allegation Reports. This may be done, at the discretion of the Commission, by cross-examination or during a penalty phase of this proceeding.

Conclusion

For all of these reasons set forth herein, Staff respectfully requests that CUB DR 9.03, its response, and any discussion related to the request and response be stricken from the Company's Reply Brief per Attachment A to CUB's Motion. If the ALJ and the Commission should allow this additional evidence produced by the Company in its Reply Brief into the evidentiary record, then Staff and Complainants request an equal opportunity to submit additional evidence into the record and, at a minimum, an opportunity to cross-examine the Company on the basis of this discovery.

Respectfully submitted,

December 29, 2009

/s/
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